No. 1, Misc.

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In the Supreme Court of the United States

AUGUST SPECIAL TERM, 1958

JOHN AARON, ET AL., PETITIONERS

v.

WILLIAM G. COOPER, ET AL., MEMBERS OF THE BOARD OF DIRECTORS OF LITTLE ROCK, ARKANSAS, INDEPENDENT SCHOOL DISTRICT, AND VIRGIL T. BLOSSOM, SUPERINTENDENT OF SCHOOLS

ON APPLICATION FOR VACATION OF ORDER OF COURT OF APPEALS FOR EIGHTH CIRCUIT STAYING ISSUANCE OF ITS MANDATE, FOR STAY OF ORDER OF DISTRICT COURT OF EASTERN DISTRICT OF ARKANSAS AND FOR SUCH OTHER ORDERS AS PETITIONERS MAY BE ENTITLED TO

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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PRELIMINARY STATEMENT

The prior course of the proceedings in this case are fully set forth in the petitioners' application to Mr. Justice Whittaker, filed on August 22, 1958. The facts which pertain to the merits of the controversy, *i. e.*, the facts which bear upon the question whether

there was adequate legal basis for the district court's order suspending the operation of the previously approved plan of desegregation, are stated in the opinion of the court of appeals, reprinted in the Appendix, *infra*, pp. 21–37.

In this brief, filed in response to the invitation of the Court, we shall discuss, first, our reasons for believing that the Court has full power to grant the relief which is sought, and, secondly, the basis for our conclusion that this relief should be granted.

DISCUSSION

The Government is primarily interested in the preservation and maintenance of public education in accordance with the Constitution. The Government believes that the Nation must be sympathetic and understanding of the difficult problems that have to be dealt with by school districts in bringing about nonsegregation in the schools and cannot fail to appreciate the adjustments that have to be made in school systems which have been operated under a different assumption for a long ferm of years. It recognizes that plans for implementation of the Court's decree may be modified in accordance with equitable principles. As the Government reads the opinions of this Court in *Brown* v. *Board of Education*, 347 U. S. 483, 349 U. S. 294, the decision so provides. The Government considers that the Court has allowed wide latitude to carry into effect the decision in accordance with the conditions in the locality and the problems involved. However, there are certain primary considerations:—first, that there be a prompt start; sec-

ond, that the action be taken and continued in good faith and by all reasonable means, under the circumstances, to accomplish the plan; third, that opposition to the decision expressed in violence and unlawful acts does not, solely or of itself, justify the abandonment or modification of the plan; and, fourth, that any change of a plan once placed into effect must provide for active steps and progress toward its objectives during any period of modification.

In the light of these basic considerations, this brief is narrowly addressed to the issues before the Court in this particular proceeding.

I

THIS COURT HAS FULL POWER TO ACT AT THIS TIME UPON PETITIONERS' APPLICATION FOR RELIEF, AND, IN DOING SO, IT SHOULD CONSIDER THE MERITS OF THE CONTROVERSY

A. THE COURT HAS FULL POWER TO PASS UPON THE APPLICATION

There is no doubt that this Court has full power to act upon the present application to vacate the stay, even though a petition for certiorari has not yet been filed by respondents. In comparable cases in which delay would be prejudicial, individual Justices have exercised the power to consider a stay before the Court has been formally seized of the matter through the filing of a petition for certiorari or the taking of an appeal. See, *e. g.*, *Rosenberg* v. *United States,* 346 U. S. 273, 285–286, 324; *Land* v. *Dollar,* 341 U. S. 737, 738; *Fahey* v. *Mallonee,* 332 U. S. 245, stay granted by Mr. Justice Rutledge, Sup. Ct. Journal, Oct. Term, 1946, p. 86 (Dec. 9, 1946); *Johnson* v. *Stevenson,* 335

U. S. 801. As these same cases show, the full Court also has the power to pass upon stay applications, and it has exercised that authority when the occasion arose. Cf. *United States* v. *Ohio*, 291 U. S. 644.

In two recent cases involving school problems, the Court has affirmatively exercised its stay powers in a similar situation. In *Tureaud* v. *Board of Supervisors*, 346 U. S. 881, a stay was granted of a Fifth Circuit judgment "which is to be brought here for review in a petition for certiorari." And in *Lucy* v. *Adams*, 350 U. S. 1, the Court reinstated an injunction which had been stayed by the district court (pending appeal) and which a circuit judge had refused to reinstate.[1]

The Court's plenary authority to grant or deny stays, interim injunctions, or other preliminary relief flows from its position as the highest judicial tribunal in the nation with both appellate and supervisory jurisdiction over the lower federal courts. The court of appeals' judgment will come before this Court on petition for certiorari,[2] and Section 2106 of Title 28 vests the Court with full power to affirm, modify, vacate, set aside or reverse that judgment. The All-Writs Statute (28 U. S. C. 1651) grants the Court full authority to issue all writs necessary or

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[1] The district court had enjoined officials of the University of Alabama from denying admission to Autherine Lucy and another; the same court then stayed its injunction pending an appeal; a judge of the court of appeals thereafter denied a motion to vacate the suspension and to reinstate the injunction.

[2] The stay issued by the court of appeals assumes that the respondents will file a petition for certiorari.

appropriate in aid of its jurisdiction. And the Court likewise has a general supervisory authority over the federal judicial system. See *Rosenberg* v. *United States,* 346 U. S. 273, 285–287; *Calvaresi* v. *United States,* 348 U. S. 961. It goes without saying that this complex of powers cannot be defeated by postponing the filing of a petition for certiorari until appropriate interim relief can no longer be afforded.

B. IN PASSING UPON THE APPLICATION, THE COURT SHOULD WEIGH THE PROBABILITY OF A REVERSAL OF THE JUDGMENT BELOW

As indicated in the stay order of the court of appeals, the only purpose of a stay of that court's judgment at this stage of the litigation would be to give this Court an opportunity to consider whether or not to review the judgment below, and, if so, to consider the merits. It is therefore fully appropriate for the Court—now convened in an extraordinary Special Term to consider the application for relief—to determine whether or not it will grant certiorari to review the judgment below, and even to consider whether it would affirm if certiorari were granted. In *Lucy* v. *Adams,* 350 U. S. 1, the Court obviously considered the merits in passing upon the stay application,[3] and it apparently did so in *Tureaud* v. *Board of Supervisors,* 346 U. S. 881. See also *Johnson* v. *Stevenson,* 335 U. S. 801; *Rosenberg* v. *United States,* 346 U. S. 273 (in which the Court, on a motion to vacate a stay, extensively considered the merits). In this case, too, if at this Special Term the Court

[3] Cases dealing with the invalidity of school segregation were cited in the *per curiam* opinion.

finds no reason to review the judgment below or if it agrees that that decision is correct, there could be no further reason for the stay granted by the court of appeals. In its *per curiam* opinion of last June 30th, the Court recognized the "vital importance of the time element in this litigation" and the need for judicial action "in ample time to permit arrangements to be made for the next school year." 357 U. S. 566, 567.

If there should be any doubt of the propriety of considering the merits at this time when only the application for relief is before the Court, it would be appropriate to call upon the present respondents (the Board of Directors of the Little Rock, Arkansas, Independent School District, and the Superintendent of Schools) to file a petition for certiorari at once, instead of waiting for thirty days as they may do under the Eighth Circuit's stay order. In *Ex parte Quirin*, 317 U. S. 1, the petitioners filed such petitions during the course of argument (317 U. S. at 6) and those petitions were promptly considered and granted (317 U. S. at 18).[4]

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[4] We believe that actually there is no occasion for doubt. It is settled practice that the courts, in determining whether a judgment should be stayed in the interest of the losing party (here, the respondents), will make a determination as to whether there is any substantial likelihood that such party can prevail on the merits. See *Virginian Ry.* v. *United States*, 272 U. S. 658, 673–674; *Air Line Pilots Ass'n, Internat'l* v. *Civil Aeronautics Bd.*, 215 F. 2d 122, 125 (C. A. 2); *Madison Square Garden Corporation* v. *Braddock*, 90 F. 2d 924, 927 (C. A. 3); *Tennessee Valley Authority* v. *Tennessee Electric Power Co.*, 90 F. 2d 885, 892–893 (C. A. 6); *Embassy Dairy, Inc.* v. *Camalier*, 211 F. 2d 41, 43–45 (C. A. D. C.)

II

THE RELIEF SOUGHT BY PETITIONERS SHOULD BE GRANTED BECAUSE THERE IS NO LIKELIHOOD THAT RESPONDENTS CAN PREVAIL ON THE MERITS

A. THERE IS NO LEGAL BASIS FOR REVERSAL OF THE COURT OF APPEALS' DECISION

At the outset, it should be stressed that this case involves a petition to postpone the effective dates of a school plan duly adopted and in effect, not an issue as to whether a plan or particular type of plan should be accepted or approved.

The decision of the district court rested upon two basic misconceptions: first, as to the governing principles laid down by this Court for determining when a delay in carrying out a school desegregation plan may be allowed; and, secondly, as to the extent to which constitutional rights may be nullified or impaired because of hostile actions taken by those opposed to the exercise of such rights.

First. (*a*) On May 17, 1954, this Court unanimously declared that racial segregation in public schools is unconstitutional. *Brown* v. *Board of Education,* 347 U. S. 483, 495, and companion cases. Because the five cases before the Court arose under different local conditions and involved a variety of local problems, the Court requested further argument on the question of relief. It invited the Attorney General of the United States and the Attorneys General of all states in which racial segregation in public schools was required or permitted to appear as *amici curiae* to present their views. Comprehensive briefs on the question of relief were submitted to the Court by the parties and the *amici,* and the oral argument extended over a period of four days (April 11–14,

1955). The Court's opinion and judgment were announced on May 31, 1955. *Brown* v. *Board of Education*, 349 U. S. 294. Any analysis of the Court's opinion must take into consideration the arguments which were made to the Court, some of which were accepted and others rejected.

Essentially, three lines of argument were made to the Court on the question of relief. On the one side, the plaintiffs contended that there was no justification, legal or factual, for any delay in enforcing their constitutional right to enter non-segregated public schools, and that the Court should require desegregation "forthwith". On the other side, the defendants and some of the *amici* pointed out that racial segregation in public schools had been in existence in more than one-third of the states and in the District of Columbia for almost a century; that during its existence it enjoyed the sanction of decisions of the Court and was believed by many people to be necessary in order to preserve amicable relations between the races; and that school segregation was part of a larger social pattern of racial relationships which reflected the mores and folkways prevalent in large areas of the country. They contended, therefore, that the Court should not go beyond its declaration of the constitutional principle, and that it should leave implementation of the principle to the voluntary conduct of the communities and individuals concerned, without imposing any limitation as to time. The United States, however, proposed a middle course. It suggested that the cases be remanded to the lower courts with directions to require the defendant school boards either to admit the plaintiffs forthwith to non-segre-

gated public schools or to propose promptly for the lower court's consideration and approval an effective plan for accomplishing desegregation as soon as practicable. It proposed that the defendants should bear the burden of proof on the question of whether, and how long, an interval of time in carrying out full desegregation is required, and that no program should receive judicial approval unless it called for an immediate and substantial start toward desegregation, in a good-faith effort to end segregation as soon as feasible.

This Court unanimously rejected the two extreme views and accepted, in essence, the proposed middle course. It stated explicitly that "the courts will require that the defendants make a prompt and reasonable start toward full compliance with our May 17, 1954, ruling." 349 U. S. at 300. If additional time for carrying out the ruling is requested, it added, the "burden rests upon the defendants to establish that such time is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date." *Ibid.* The Court specifically enumerated factors which the lower courts might consider as justifying the allowance of additional time: "problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems." 349 U. S. at 300–301. The factor of community hostility or

opposition to desegregation was not included in the list. The Court dismissed in a single sentence the suggestion that the plaintiffs should forego their "personal and present" right (cf. *Sweatt* v. *Painter*, 339 U. S. 629, 635) not to be segregated while attending public schools until such time as others in the community might be agreeable:— "* * * it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them." 349 U. S. at 300.

In short, the Court made it clear that mere popular hostility, where it exists, can afford no legal justification for depriving Negro children of their constitutional right. The Court was explicit in its insistence that there be "good-faith compliance at the earliest practicable date." Where additional time was sought, it could be allowed only where necessary in order "to effectuate a transition to a racially non-discriminatory school system." Additional time, where permitted, must be for the purpose of enabling the authorities to take necessary constructive measures—measures looking towards full compliance. The Court thus indicated that it will not countenance delay as a mere interlude during which little or nothing would be done to effectuate transition to a nonsegregated system.

(*b*) On the face of it, the district court's decision in the present case rests on the consideration of factors which this Court ruled out as inadmissible.

The Little Rock plan of school desegregation [5] was

[5] The full details of this plan are set out in *Aaron* v. *Cooper*, 243 F. 2d 361 (C. A. 8) and *Faubus* v. *United States*, 254 F. 2d 797 (C. A. 8).

carefully worked out over a period of three years. Under the plan, complete desegregation was not to be effected until 1963. Previously challenged by these petitioners as being too slow, it was nonetheless approved by the district court and by the court of appeals as being "in present compliance with the law" as expressed by this Court's mandate.

The plan, ordered put into effect "forthwith,"[6] has been in operation for an entire school year. In the instant proceeding, however, the district court ordered a suspension in the operation of the plan theretofore approved. The justification, in the district court's words, is "the deep seated popular opposition in Little Rock to the principle of integration, which, as is known, runs counter to the pattern of southern life which has existed for over three hundred years."[7] The manifestation of this opposition by certain "overt acts which have actually damaged educational standards" is given as a further reason.

This Court's mandate, however, required a prompt beginning, and, thereafter, progress with "all deliberate speed." The Court countenanced the possibility of delay only to the extent that time might be necessary in order to work out constructive measures for accomplishment of the transition. It declared that the constitutional principles might not yield

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[6] See *Aaron* v. *Cooper*, 156 F. Supp. 220, 225 (E. D. Ark.).

[7] The opinion suggests, in this connection, that "the people of Little Rock might be much more willing to acquiesce in integration as contemplated by the plan" after the completion of certain pending litigation in the state courts of Arkansas.

"simply because of disagreement with them." As it recently stated the proposition in another context (exclusion of Negroes from grand jury service in Orleans parish, Louisiana), "local tradition cannot justify failure to comply with the constitutional mandate requiring equal protection of the laws." *Eubanks* v. *Louisiana*, 356 U. S. 584, 588.[8]

The district court's disposition of this case, as the court below has held, cannot be squared with these admonitions. It does not require constructive measures of implementation; it endorses a moratorium in order to "wait and see" what may happen.

Second. The district court did not rely solely on its finding that there were traditions and attitudes in the community which were hostile to desegregation. It gave weight to the fact that the opposition "is more than a mere mental attitude" and has "mani-

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[8] The Fourth and Fifth Circuits have both held that "local tradition" cannot excuse a failure to proceed expeditiously in compliance with this Court's decision in the school cases. *Allen* v. *County School Board of Prince Edward Co., Va.*, 249 F. 2d 462 (C. A. 4); *School Board of City of Charlottsville, Va.* v. *Allen*, 240 F. 2d 59 (C. A. 4); *Jackson* v. *Rawdon*, 235 F. 2d 93 (C. A. 5), certiorari denied, 352 U. S. 925. As Chief Judge Hutcheson stated in the *Jackson* case (235 F. 2d at 96), a school board has a duty to abolish segregation "completely uninfluenced by private and public opinion as to the desirability of desegregation in the community * * *".

fested itself in overt acts which have actually damaged educational standards and which will continue to do so if relief is not granted."

This reliance upon overt manifestations of opposition to desegregation reflects the fundamental error in the district court's decision. For inherent in that ruling is the idea that the constitutional rights of some citizens may be suspended or ignored because of the antagonistic acts of others. If constitutional rights could be so easily negated, they would amount to little. Here, it should be noted, there is not the slightest suggestion that the colored children did anything to incite violence or disorderly conduct. Because they were colored, their mere presence in the school led others to engage in the conduct which the district court thought to be sufficient justification for suspending the children's constitutional rights—rights which can be enforced only while they are of school age, so that any "suspension" of their rights is actually a permanent and irretrievable deprivation.

This Court has rejected the claim that a restriction upon the rights of Negroes might be justified as a means of avoiding racial disturbance. "That there exists a serious and difficult problem arising from a feeling of race hostility which the law is powerless to control, and to which it must give a measure of consideration, may be freely admitted," the Court said. "But its solution cannot be promoted by depriving citizens of their constitutional rights and

privileges." *Buchanan* v. *Warley*, 245 U. S. 60, 80–81.[9]

The court below has stated in the instant case (Appendix, *infra*, p. 34), that it would create an "impossible situation" if the district court's order were sustained. "Every school district in which integration is publicly opposed by overt acts would have 'justifiable excuse' to petition the courts for delay and suspension in integration programs. An affirmance of 'temporary delay' in Little Rock would amount to an open invitation to elements in other districts to overtly act out public opposition through violent and unlawful means." *Ibid.*

B. BOTH THE SCHOOL AUTHORITIES AND THE DISTRICT COURT CAN ADOPT MEASURES CALCULATED TO PROTECT PETITIONERS' CONSTITUTIONAL RIGHTS

We believe that the decision of the court of appeals is correct in that it recognizes that the narrow grounds of opposition, violence and unlawful acts do not justify a postponement of the plan.

We point out additionally that, as in the case of any application for equitable relief, the respondents were obligated to do everything within their power before they could obtain relief from the court. Had an affirmative burden of proving need for additional time been assumed and the case proved on justifiable and equitable grounds, the Court would have a different problem before it.

As the court below observed (Appendix, *infra*, p. 34, the school authorities and the district court are not without means to deal with the prevailing situation and to protect petitioners' constitutional rights.

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[9] Cf. *Moore* v. *Dempsey*, 261 U. S. 86, 90 (right to a fair and orderly trial may not be surrendered "to appease the mob spirit") and *Terminiello* v. *Chicago*, 337 U. S. 1, 5 (speech might not be suppressed because it "stirred people to anger, invited public dispute, or brought about a condition of unrest").

1. Respondents can obtain injunctive relief to protect them from outside interference with the performance of their constitutional duties

While it may be true, as the district court found, that "deep-seated popular opposition to the principle of integration" exists in Little Rock, it is clear that the active instigators of obstruction are limited in number. In response to interrogatories put to them by petitioners, respondents were readily able to name the individuals and the organization primarily responsible for the "campaign of opposition" to their plan.[10] Respondents can seek—and, if the practical necessities require, they have a duty to seek—injunctive relief against this band of troublemakers. This is precisely what was done by the school authorities of Hoxie School District No. 46, also in Arkansas, when their plan of desegregation met with massive interference spearheaded by a small group. Indeed, it should be noted that one of the defendants against whom injunctive relief was sought in that case,[11] Amis Guthridge, is also named by respondents here as being among the active obstructionists to school integration in Little Rock.[12]

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[10] "The persons * * * are Amis Guthridge, Robert Ewing Brown, Theo Dillaha, Sr., Will J. Brown, the Reverend Wesley Pruden, and innumerable other persons who are members of Capitol Citizens Council, an association incorporated under the laws of the State of Arkansas, all of whom are residents of Little Rock. * * *"

[11] *Hoxie School Dist. No. 46 of Lawrence Co., Ark.* v. *Brewer*, 137 F. Supp. 364 (E. D. Ark.).

[12] Moreover, in addition to three other individual defendants, injunctive relief in the *Hoxie* case was sought and obtained against White America, Inc., a corporation organized and operating under the laws of the State of Arkansas, Citizens Com-

In the *Hoxie* case, the defendants challenged the authority of the School Board to seek injunctive relief. The district court responded by stating (*Hoxie School District No. 46 of Lawrence Co., Ark.* v. *Brewer,* 137 F. Supp. 364, 367 (E. D. Ark.)):

> If the defendants in fact conspired to deprive (among others) Negro pupils of their constitutional rights, then it would seem proper for the plaintiffs, so closely related as they were to the victims in this case, to bring a restraining suit. They were officials of a great state and an omission by them would, in effect, be a deprivation of rights under color of law.

The court of appeals agreed (*Brewer* v. *Hoxie School District No. 46,* 238 F. 2d 91, 101 (C. A. 8)):

> * * * [T]here is no question that * * * school board members may be protected by a federal injunction in their efforts to discharge their duty under the Fourteenth Amendment.

In similar fashion, the Court of Appeals for the Sixth Circuit sustained the right of the school authorities of Clinton, Tennessee, to petition the district court for injunctive relief against John Kasper and an organized group of followers who sought "to impede, obstruct and intimidate" them from carrying out a desegregation order of the court. *Kasper* v. *Brittain,* 245 F. 2d 92, 94 (C. A. 6), certiorari denied, 355 U. S. 834.

Even in the absence of an application for injunctive

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mittee Representing Segregation in the Hoxie Schools, an unincorporated association, and White Citizens Council of Arkansas, an unincorporated association.

relief on the part of respondents, the district court, sitting as a court of equity, had ample power to direct that such relief be sought. *Faubus* v. *United States et al.*, 254 F.2d 797 (C. A. 8), pending on petition for a writ of certiorari, No. 212, Oct. Term, 1958. If intervention by the court was indeed necessary to deal with the threat of interference, then certainly the remedy to be fashioned was one directed *at* the obstructionists, not in their favor.

2. Respondents can maintain firmer discipline within Central High School

In Paragraph 11 of their "Substituted Petition," respondents, after reciting the outside interference which they have encountered, state:

> A large majority of the pupils in Central High School have exhibited the highest type of good citizenship in their daily scholastic activities, but a small group, with the encouragement of certain adults, has absorbed the prevailing spirit of defiance and has almost daily created incidents which make it exceedingly difficult for teachers to teach and for pupils to learn. The existing pupil unrest, teacher unrest, and parent unrest, likewise make it difficult for the District to maintain a satisfactory educational program.

The group of students interfering with the plan numbered no more than twenty-five (Tr. 72).[13] Despite numerous and repeated instances of slugging, kicking, spitting, name-calling and wanton destruction of school

[13] Of these twenty-five, there were "five or ten" students who were known to be the ringleaders of the group (Tr. 64).

property,[14] only two students were expelled (Appendix, *infra*, p. 28).

Mr. J. O. Powell, Central High School's own Vice-Principal of Boys, was convinced that if the school adopted and carried out a firm policy of long-term suspension and, if necessary, permanent expulsion of serious troublemakers, the problems of the past school year would be considerably reduced (Tr. 72, 74–75). These views were shared by petitioners' two expert witnesses, Dr. Rogers, Dean of the School of Education of Syracuse University, and Dr. Salten, City Superintendent of Schools at Long Beach, New York (Tr. 366–386; 446–458).

3. There has been no showing that respondents have invoked the assistance of other responsible state agencies

The primary responsibility for maintaining order in the community and taking all other necessary measures to the end that the decree of the district court may be duly carried out rests upon the State and its officials. See *City of Chicago* v. *Sturges*, 222 U. S. 313, 322; *Sterling* v. *Constantin*, 287 U. S. 378, 404. Respondents are state officials and, as such, obligated under the Constitution to administer the public schools of the District so that public education will be available on a non-discriminatory basis. *Board of Education* v. *Barnette*, 319 U. S. 624, 637. Respondents petitioned the district court to relieve them from this obligation on the ground that opposition to the admission of colored school children had assumed serious proportions. But, according to the

[14] See Tr. 50, 51, 111–112.

record, they failed to show that they sought assistance from other duly constituted authorities of the State to aid them in the performance of their duties.

Thus, there is no evidence in the record to indicate that determined local authorities cannot handle, if necessary, any future disturbance occurring in or around Central High School. There was no showing that, prior to coming into court, respondents had even consulted with local law enforcement agencies. Nor was there any showing that they sought to enlist the aid of the Mayor of Little Rock, the City Manager, or any other official of the State.

CONCLUSION

The jurisdiction of this Court has been properly invoked. Since the decision of the court of appeals is clearly correct and there is no likelihood that respondents can prevail on the merits, the relief sought by petitioners should be granted.

Respectfully submitted.

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AUGUST 1958.

APPENDIX

In the United States Court of Appeals for the Eighth Circuit

No. 16034

JOHN AND THELMA AARON, MINORS, BY THEIR MOTHER AND NEXT FRIEND, (MRS.) THOMAS AARON; ET AL., APPELLANTS

vs.

WILLIAM G. COOPER, ET AL., MEMBERS OF THE BOARD OF DIRECTORS OF THE LITTLE ROCK, ARKANSAS INDEPENDENT SCHOOL DISTRICT, AND VIRGIL T. BLOSSOM, SUPERINTENDENT OF SCHOOLS, APPELLEES

[August 18, 1958]

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS

Before GARDNER, Chief Judge, and SANBORN, WOODROUGH, JOHNSEN, VOGEL, VAN OOSTERHOUT and MATTHES, Circuit Judges.

MATTHES, *Circuit Judge.*

This appeal is another in a series of legal actions which followed the adoption and implementation of a plan for gradual integration of the public schools in Little Rock, Arkansas, as set up by the school board in that district, and approved by the United States District Court for the Eastern District of Arkansas, and by this Court. See *Aaron* v. *Cooper* (E. D. Ark. 1956) 143 F. Supp. 855, *aff'd* 243 F. 2d 361 (8 Cir. 1957); *Thompson* v. *Cooper* (8 Cir. 1958) 254 F. 2d

808; *Faubus* v. *United States* (8 Cir. 1958) 254 F. 2d 797.

In conformity with the plan, and under the direction of the Superintendent of Schools of the Little Rock School District (hereinafter called "District") approximately sixty Negro students were meticulously screened prior to the opening of schools in September, 1957. Seventeen were accepted for entrance in the final two years in high school, but when eight of the students voluntarily withdrew, the nine remaining attempted to enter the school when it opened. After a series of skirmishes, resulting in the placing of troops around the Central High School building, (see *Faubus* v. *United States*, supra), the nine Negro students were admitted and eight of them attended the full year. On February 20, 1958, the members of the school board hereinafter called "Board") and the Superintendent, filed a petition in the United States District Court, Eastern District of Arkansas, Western Division, asking that the plan of integration "be realistically reconsidered in the light of existing conditions," and that it be postponed until such time as the concept of "all deliberate speed" could be clearly defined. Thereafter, the Honorable Harry J. Lemley, United States District Judge for the Eastern and Western Districts of Arkansas, was designated by the Chief Judge of this Circuit to hear and determine the issues presented by the petition. At the District Court's direction appellees filed an amended petition in which they alleged that in light of existing conditions they were of the opinion that a suspension of operations under the plan until January, 1961, was reasonable and advisable. Appellants attacked the petition by a motion to dismiss, contending that the petition was insufficient to state a cause for relief or a claim for relief which would be cognizant under

Rule 60 (b) of the Federal Rules of Civil Procedure. They also filed a response to the petition. Following an extended trial of the issues presented by the pleadings, the District Court filed an exhaustive opinion, . . . F. Supp. . . ., and entered its order granting permission to suspend the operation of the plan of integration until mid-semester of the 1960–61 school year.

From that order, plaintiffs (appellants) presented an appeal to this Court. Because of the vital importance of the time element in the litigation, and in line with the suggestion of the Supreme Court in its per curiam order of June 30, 1958, on petition for certiorari, we heard the appeal on its merits on August 4, 1958.

A review of the events leading up to the present appeal, as revealed by the record, is necessary to a proper understanding of the meritorious question for decision.

On May 20, 1954, following the decision of the Supreme Court in *Brown* v. *Board of Education* on May 17, 1954, 347 U. S. 483, the Board adopted a statement concerning the *Brown* decision, recognizing its responsibility to comply with Federal Constitutional requirements, and on May 24, 1955—several days prior to the supplemental opinion of the Supreme Court in *Brown* v. *Board of Education*, 349 U. S. 294, the Board approved a "Plan of School Integration", which provided for a gradual integration of all public schools, beginning with the high school level, in the Fall of 1957. See *Aaron* v. *Cooper*, 143 F. Supp. 855 for the plan in its entirety, *aff'd* (8 Cir.) 243 F. 2d 361.

It was the feeling of the Board that the plan, as proposed, was the most desirable and workable under all of the circumstances, and that as the result of an

active public relations program, the public generally approved of the plan. However, a systematic campaign developed which undermined whatever confidence the public might have had in the plan to integrate the public schools. In November, 1956, the people of the State of Arkansas adopted: (A) Amendment 44 to the State Constitution, which commanded the General Assembly to oppose by every constitutional method the "Un-Constitutional desegregation decisions of May 17, 1954 and May 31, 1955 (the two *Brown* decisions) of the United States Supreme Court" (1 Ark. Stat. 1947, 1957 Supplement); (B) A resolution of interposition which, inter alia, called upon the people of the United States and the governments of all the separate states to join the people of Arkansas in securing an adoption of an amendment to the Constitution of the United States which would provide that the powers of the federal government should not be construed to extend to the regulation of the public schools of any state, or to prohibit any state from providing for the maintenance of racially separate but substantially equal public schools within such state; (C) A pupil assignment law dealing with the assignment of individual pupils to individual public schools. The 61st General Assembly of Arkansas, which convened in January, 1957, enacted Sections 80–1519 to 80–1524, Ark. Stat. 1947, known as The Pupil Assignment Law; Section 80–1525, ibid, which relieves school children of compulsory attendance in racially mixed public schools; Sections 6–801 through 6–824, ibid, which established a State Sovereignty Commission; Section 80–539 ibid, which authorizes local school boards to expend district funds in employing counsel to assist in the solution of problems arising out of integration.

During the summer of 1957, anti-integration forces, pointing to the recent Arkansas enactments, petitioned for, and received from the Pulaski Chancery Court at Little Rock, an injunction directed against the Board, restraining any action towards integrating Little Rock Central High School during the school term beginning September 3, 1957. On August 29, 1957, on application of the Board, the United States District Court at Little Rock entered an order enjoining the use of the state court injunction in an attempt to block the integration plan. We affirmed this order. *Thomason* v. *Cooper* (8 Cir.) 254 F. 2d 808.

From the testimony of the Superintendent, and voluminous exhibits, consisting mainly of newspaper articles and paid advertisements, it is demonstrated that pro-segregationists carried on a relentless and effective campaign during the summer of 1957. The Governor of Georgia, Marvin Griffin, and Roy V. Harris, publisher, of the same state, and Reverend J. A. Lovell, described as a "Texas Radio Minister," appeared in Little Rock and delivered speeches against integration to large audiences. The effect of these efforts may be gleaned from the Superintendent's testimony; (Mr. Blossom)—"[B]ut there was a tremendous amount of opposition following the appearance of the Governor of Georgia * * * that this plan which had been developed as I explained over a long period of time, seemed to be driven out of everybody's mind. * * * In the minds of people who talked to me the thing that became prevalent [was] 'We don't have to do this when the Governor of Georgia says nobody else has to do it.'" On July 9, 1957, what purports to be a full page paid statement appeared in the Arkansas Democrat, the first two paragraphs of which are typical, not only of the statement in its

entirety, but of other articles appearing from time to time in the same publication:

> "PEOPLE OF ARKANSAS vs. RACE-MIXING! OFFICIAL POLICY OF THE STATE OF ARKANSAS
>
> "The People of Arkansas assert that the power to operate public schools in the State on a racially separate but substantially equal basis was granted by the people of Arkansas to the government of the State of Arkansas; and that, by ratification of the Fourteenth Amendment, neither the State of Arkansas nor its people delegated to the federal government, expressly or by implication, the power to regulate or control the operation of the domestic institutions of Arkansas; *any and all decisions of the federal courts or any other department of the federal government to the contrary notwithstanding.*"
>
> WHOSE STATEMENT IS THE ABOVE?
>
> It is the statement of Gov. Orval E. Faubus of Arkansas. It is the core of the Resolution of Interposition which he personally fathered. Governor Faubus hired the solicitors who circulated the petitions to place this Resolution on the ballot. Governor Faubus filed Resolution and petitions with the Secretary of State on July 5, 1956, and the Resolution was submitted to the people in last November's general election. THE PEOPLE OF ARKANSAS BY A TREMENDOUS, OVERWHELMING MAJORITY GAVE IT THEIR THUNDERING APROVAL.
>
> Sponsored by the Governor of Arkansas, adopted by a tremendous majority of Arkansas voters, THE ABOVE STATEMENT IS THE WILL OF THE PEOPLE OF ARKANSAS."

As September 3rd approached, the opposition to Negro children entering Central High School had

stiffened and solidified. On the night of September 2d, Governor Faubus appeared on television in Little Rock and announced that in the interest of preserving peace, he had called out units of the National Guard, and had directed that the white schools be placed "off limits" to Negro students, and that the Negro schools be placed "off limits" to white students. The subsequent events, which ultimately brought forth United States troops, and the entry of the nine Negro children in Central High School, are found in our opinion in *Faubus* v. *United States,* supra.

The record firmly establishes that although the Negro children attended Central High School during the 1957–58 school term under the protection of Federal troops, and later, federalized national guardsmen, the opposition to the plan of integration by many members of the public, and particularly parents of white students, failed to subside. Whether the white students who were the trouble makers, stood for segregation of the races in schools as the result of their environment over the years, or because of the intense campaign that was focused upon that issue by adults, does not appear, but the indisputable fact is that certain of the white students demonstrated their hostility to integration by overt acts of violence and misconduct, committed within the school building, as well as by destruction of school property through acts of vandalism. The events which occurred during the school year may be summarized as follows:

(1) Although there were no unusual events in the classrooms, there were a number of incidents in the halls, corridors, cafeteria and rest rooms, consisting mainly of "slugging, pushing, tripping, catcalls, abusive language, destruction of lockers, and urinating on radiators.

(2) Forty-three bomb threats necessitated searches of the school building, and particularly the lockers,

some 2400 in number. These bomb threats were broadcast on the local radio and television stations, precipitating calls from parents and withdrawal of students for the day.

(3) Numerous small fires occurred within the building, particularly in rest rooms where tissue paper and towels accumulated.

(4) The destruction of school property throughout the school necessitated the expenditure of school funds, which might otherwise have been used for general maintenance purposes, to repair the damage.

(5) Misconduct on the part of some students resulted in approximately 200 temporary suspensions for short periods of time, and two permanent expulsions.

(6) The administrative staff in the school spent a great deal of time making reports of incidents, alleged and real, arising out of opposition to the presence of the nine Negro students.

(7) Teachers and administrative staff were subjected to physical and mental strain and telephone threats.

(8) Inflammatory anti-integration speeches were made at public meetings by speakers from other states, and the local newspapers carried many anti-integration articles.

(9) Vicious circulars were distributed condemning the District Court, the Supreme Court of the United States, and the school officials who recognized the supremacy of the Federal law.

(10) Vulgar cards, critical of the school officials, were given by adults to school children for distribution within the school building.

(11) In general there was bedlam and turmoil in and upon the school premises, outside of the classrooms.

Careful and critical analysis of the relevant facts and circumstances in light of applicable legal principles, leads us to the inescapable conclusion that the order of the District Court suspending the plan of integration can not stand.

In *Brown* v. *Board of Education,* 349 U. S. 294, the Supreme Court, in dealing with the manner in which integration should be effected, recognized that full implementation of the constitutional principles involved may require solution of varied local school problems—and that the school authorities have the primary responsibility for "elucidating, assessing, and solving the problems." While the District Courts, aided and guided by equitable principles, may properly take into account the public interest in the elimination of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth in *Brown* v. *Board of Education,* May 17, 1954, 347 U. S. 483, it should be emphasized that the Court, in the opinion dealing with the relief to be granted, stated (349 U. S. at page 300): "But it should go without saying that the vitality of these constitutional principles *cannot be allowed to yield simply because of disagreement with them.*" [Emphasis supplied.]

The precise question at issue herein, i. e., whether a plan of integration, once in operation, may lawfully be suspended because of popular opposition thereto, as manifested in overt acts of violence, has not received judicial consideration. But there is sound and convincing authority that a school board, "acting promptly and *completely uninfluenced by private and public opinion* as to the desirability of desegregation in the community," must proceed with deliberate speed, consistent with proper administration, to abolish segregation, *Jackson* v. *Rawdon* (5

Cir. 1956) 235 F. 2d 93, 96, *certiorari denied* 352 U. S. 925; *School Board of the City of Charlottesville, Va.* v. *Allen* (4 Cir. 1956) 240 F. 2d 59, *certiorari denied*, 353 U. S. 910; and while "* * * a good faith acceptance by the school board of the underlying principle of equality of education for all children with no classification by race might well warrant the allowance by the trial court of time for such reasonable steps in the process of desegregation as appears to be helpful in avoiding unseemly confusion * * * [n]evertheless, whether there is such acceptance by the Board or not, the duty of the Court is plain. *The vindication of rights guaranteed by the Constitution can not be conditioned upon the absence of practical difficulties.*" [Emphasis supplied.] *Orleans Parish School Board* v. *Bush* (5 Cir. 1957) 242 F. 2d 156 at p. 166, *certiorari denied* 354 U. S. 921. "The fact that the schools might be closed if the order were enforced is no reason for not enforcing it," *Allen* v. *County School Board of Prince Edward County, Va.*, (4 Cir. 1957) 249 F. 2d 462, 465, *certiorari denied* 355 U. S. 953, because, as the Court there stated, at page 465: "A person may not be denied enforcement of rights to which he is entitled under the Constitution of the United States because of action taken or threatened in defiance of such rights."

In his opinion * * * F. Supp. * * *, which incorporated findings of fact and conclusions of law, Judge Lemley, who has most carefully and conscientiously considered the problem presented, recognized that the occurrences which motivated the instant proceeding were the direct result of general community opposition to integration. He stated:

> "From the practically undisputed testimony of the Board's witnesses we find that although the continued attendance of the Negro students

at Central High School was achieved throughout the 1957–58 school year by the physical presence of federal troops, including federalized national guardsmen, *nevertheless on account of popular opposition to integration* the year was marked by repeated incidents of more or less serious violence directed against the Negro students and their property, by numerous bomb threats directed at the school, by a number of nuisance fires started inside the school, by desecration of school property, and by the circulation of cards, leaflets, and circulars designed to intensify opposition to integration. * * *" [Emphasis added.]

* * * * *

"It is important to realize, as is shown by the evidence, that the racial incidents and vandalism which occurred in Central High School during the past year did not stem from mere lawlessness on the part of the white students in the school, or on the part of the people of Little Rock outside the school; nor did they stem from any malevolent desire on the part of the students or others concerned to bomb the school, or to burn it down, or to injure or persecute as individuals the nine Negro students in the school. *Rather, the source of the trouble was the deep seated popular opposition in Little Rock to the principle of integration,* which, as is known, runs counter to the pattern of southern life which has existed for over three hundred years. The evidence also shows that to this opposition was added the conviction of many of the people of Little Rock, that the Brown Decisions do not truly represent the law, and that by virtue of the 1956–57 enactments, heretofore outlined, integration in the public schools can be lawfully avoided." [Emphasis supplied.]

* * * * *

"* * * In reaching this conclusion we are not unmindful of the admonition of the Supreme

> Court that the vitality of those principles 'cannot be allowed to yield simply because of disagreement with them'; here, however, as pointed out by the Board in its final brief, the opposition to integration in Little Rock is more than a mere mental attitude; it has manifested itself in overt acts which have actually damaged educational standards and which will continue to do so if relief is not granted."

Appalling as the evidence is—the fires, destruction of private and public property, physical abuse, bomb threats, intimidation of school officials, open defiance of the police department of the City of Little Rock by mobs—and the naturally resulting additional expense to the District, disruption of normal educational procedures, and tension, even nervous collapse of the school personnel, we cannot accept the legal conclusions drawn by the District Court from these circumstances. Over and over again, in the testimony, we find the conclusion that the foregoing turmoil, chaos and bedlam directly resulted from the presence of the nine Negro students in Central High School, and from this conclusion, it appears that the District Court found a legal justification for removing temporarily the disturbing influence, i. e., the Negro students. It is more accurate to state that the fires, destruction of property, bomb threats, and other acts of violence, were the direct result of popular *opposition to* the presence of the nine Negro students. To our mind, there is a great difference from a legal standpoint when the problem in Little Rock is stated in this manner. From the record it appears that none of the Negro students was responsible for the incidents on the school property, and the one Negro expulsion seems to have resulted after the Negro student was physically struck in the face, following which it was found that the student had "failed to adjust", in

violation of an agreement with the school board not to become embroiled in incidents.

This Court recognizes that, following the first *Brown* decision, the members of the Board, acting in good faith, and working with the Superintendent of Schools, moved promptly to promulgate a plan designed to gradually bring about complete integration in the Little Rock public schools, and they are to be commended for their efforts in that regard. We are also not unmindful of the difficulties which were faced by the board members and school administrators in attempting to give life to the plan of integration. As we have seen, they have been constantly harassed; they have met with overt opposition from the public, and the legislature through passage of the 1957 enactments. The executive department of the State of Arkansas has openly opposed their efforts, as demonstrated by the statement by the Governor of the official policy of the state of Arkansas against integration, followed by the use of National Guardsmen to prevent entry of Negro students. The result was to place the Board between "the upper and the nether millstone." See *Thomason* v. *Cooper,* 254 F. 2d 808 at page 810. While it may appear to the members of the Board and the Superintendent, that they have a thankless task, they may be recompensed by the knowledge that throughout, they, as public officers, have recognized their duty to support the Constitution of the United States, and to respect the laws and courts of our Federal Government, and our democratic ideals, regardless of their personal convictions with respect to the wisdom of school integration.

It is not the province of this Court in this proceeding to advise the Board as to the means of implementing integration in the Little Rock Schools. We are directly concerned only with the legality of

the order under review. We do observe, however, that at no time did the Board seek injunctive relief against those who opposed by unlawful acts the lawful integration plan, which action apparently proved successful in the Clinton, Tennessee and Hoxie, Arkansas situations. See *Kasper* v. *Brittain,* 245 F. 2d 92 (6 Cir. 1957), *certiorari denied* 355 U. S. 834, *rehearing denied* 355 U. S. 886; *Hoxie School District* v. *Brewer* (E. D. Ark.) 137 F. Supp. 364, *aff'd Brewer* v. *Hoxie School District* (8. Cir. 1956) 238 F. 2d 91. The evidence also affords some basis for belief that if more rigid and strict disciplinary methods had been adopted and pursued in dealing with those comparatively few students who were ring leaders in the trouble making, much of the turmoil and strife within Central High School would have been eliminated.

An impossible situation could well develop if the District Court's order were affirmed. Every school district in which integration is publicly opposed by overt acts would have "justifiable excuse" to petition the courts for delay and suspension in integration programs. An affirmance of "temporary delay" in Little Rock would amount to an open invitation to elements in other districts to overtly act out public opposition through violent and unlawful means. The Supreme Court of the United States has specifically determined that segregation in the public schools is a deprivation of the equal protection of laws guaranteed by the Fourteenth Amendment. The Board, by public statement, has recognized its constitutional duty to provide non-segregated educational opportunities for the children of Little Rock; the District Court, in its memorandum opinion, *supra,* at page * * *, stated: "* * * it is not denied that under the Brown decisions the Negro students in the Little

Rock District have a constitutional right not to be excluded from any of the public schools on account of race;". Acting under a federal court order, the Board did proceed with a fair and reasonable program for gradual integration, which program had previously been approved by this Court. The issue plainly comes down to the question of whether overt public resistance, including mob protest, constitutes sufficient cause to nullify an order of the federal court directing the Board to proceed with its integration plan. *We say the time has not yet come in these United States when an order of a Federal Court must be whittled away, watered down, or shamefully withdrawn in the face of violent and unlawful acts of individual citizens in opposition thereto.*

Mindful as we are that the incidents which occurred within Central High School produced a situation which adversely affected normal educational processes, we nevertheless are compelled to hold that such incidents are insufficient to constitute a legal basis for suspension of the plan to integrate the public schools in Little Rock. To hold otherwise would result in "* * * accession to the demands of insurrectionists or rioters * * *", *Strutwear Knitting Co.* v. *Olson,* 13 F. Supp. 384 at 391, and *Faubus* v. *U. S.*, 254 F. 2d 797 at 807, and the withholding of rights guaranteed by the Constitution of the United States. Accordingly, the order of the District Court is reversed, with directions to dismiss the appellees' petition.

GARDNER, *Chief Judge,* dissenting.

I would affirm on the grounds stated by Judge Lemley in his opinion. *Aaron* v. *Cooper,* E. D. Ark., * * * F. Supp. * * *

Because of the limitation of time within which this case must be decided it is not possible to prepare a

dissenting opinion and, hence, I am preparing only a short memorandum.

It is conceded that the school authorities have acted in good faith both in formulating a plan for integrating and in attempting to implement that plan. Their efforts in this regard were met with unprecedented and unforeseen opposition and resistance as set out and enumerated in the majority opinion. This opposition included acts of violence to such an unprecedented extent that the armed forces of the United States were stationed in and about the school building. The events pertinent to the attempts of the school authorities during the school year to implement its plan for integrating are set forth in the majority opinion. The normal conduct of the school was continuously disrupted and the state of mind, both within and without the school, was to a greater or lesser extent in a state of hysteria. Under circumstances and conditions set out in Judge Lemley's opinion the school authorities made application for an extension of time so as to permit a cooling off or breathing spell so that both pupils, parents, teachers and the public might to some extent become reconciled to the inevitable necessity for public school integration. Having in mind that the school officials and the teaching staff acted in good faith and that the school officials presented their petition for an extension of time in good faith, it was the duty of the court "to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles". *Brown* v. *Board of Education,* 349 U. S. 294. In this situation the action of Judge Lemley in extending the time as requested by the school officials was the exercise of his judicial discretion. The background is well set forth in Judge Lemley's opinion. For centuries there had been no intimate social rela-

tions between the white and colored races in the section referred to as the South. There had been no integration in the schools and that practice had the sanction of a decision of the Supreme Court of the United States as constitutionally legal. It had become a way of life in that section of the country and it is not strange that this long-established, cherished practice could not suddenly be changed without resistance. Such changes, if successful, are usually accomplished by evolution rather than revolution, and time, patience, and forbearance are important elements in effecting all radical changes. The action of Judge Lemley was based on realities and on conditions, rather than theories. The exercise of his discretion should not, I think, be set aside as it seems to me it was not an abuse of discretion but rather a discretion wisely exercised under the conditions. We should not substitute our judgment for that of the trial court. Judge Lemley's decision is not without precedent in principle. It is, I think, warranted by the decision of the Supreme Court in *Brown* v. *Board of Education,* 349 U. S. 294. See also *Allen* v. *County School Board of Prince Edward County,* E. D. Va., * * * F. Supp. * * *; *Davis* v. *County School Board of Prince Edward County, E. D. Va.,* 149 F. Supp. 431; *Wisconsin* v. *Illinois,* 278 U. S. 367, modified, 281 U. S. 179, 289 U. S. 395, 309 U. S. 569, 311 U. S. 107; *Standard Oil Co.* v. *United States,* 221 U. S. 1. It was the judgment of the school officials as indicated by their petition and, after hearing, the judgment of the trial court, that the extension of time requested should be granted. I do not think it can be said that the findings of the trial court and its conclusion based thereon are clearly erroneous. I would affirm.

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